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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

Date: FEB 10 2012 Office: NEBRASKA SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an engineering consulting company. It seeks to employ the beneficiary permanently in the United States as a technical recruiter pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess the foreign equivalent of a U.S. Master's degree in human resources, business administration, or commerce as required by the certified labor certification. The petition was denied on December 4, 2008.

On appeal, counsel asserts that the beneficiary's five years of foreign education is equivalent to the five-year Master's of Business Administration (MBA) programs in the United States and is thus acceptable under the terms of the labor certification.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The beneficiary possesses a foreign three-year bachelor's degree and a foreign two-year master's degree. Thus, the issues are whether the beneficiary's three-year foreign bachelor's degree followed by a two-year Master's degree is the foreign equivalent to a U.S. Master's degree as the labor

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

certification requires a Master's degree in Human Resources, Business Administration, or Commerce.

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

On appeal, counsel relies on a letter from Mr. Efren Hernandez III, Director of the Business and Trade Services Branch of U.S. Citizenship and Immigration Services' (USCIS) Office of Adjudications. The letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. The Office of Adjudications letter is not binding on the AAO.[2] Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (Dec. 7, 2000) (copy incorporated into the record of proceeding).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

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[2] Additionally, the letter is not directly on point. While the beneficiary's Master's and Bachelor's could be considered together as the equivalent of a bachelor's degree in commerce, the petitioner did not state on the certified labor certification that a bachelor's degree and five years of experience was an allowed alternate combination of education and experience.

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be a "foreign equivalent" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[3] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to

[3] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

> determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS [now USCIS], therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree is the minimum level of education required. Line 4b states the accepted field as Human Resources. Line 7 allows Business Administration or Commerce as the allowed alternate fields of study. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a

foreign educational equivalent is acceptable. In addition, Line 14 states that three months of education, training, or experience using EXCEL is required for the position.[4]

The beneficiary stated that she holds a Master's of Commerce degree from Annamalai University, awarded August 28, 2003 and a Bachelor of Commerce (Honours Course) from the University of Delhi, awarded in February 2001. The petitioner submitted a provisional certificate for the Master's degree and a statement of marks. The director determined that the beneficiary did not have the foreign equivalent of a U.S. Master's degree as her foreign Bachelor of Commerce degree was three years in duration and not the foreign equivalent of a U.S. bachelor's degree, so when coupled with a two year Master's degree, the beneficiary has five years of education which is not the foreign equivalent of a U.S. Master's degree to meet the terms of the certified labor certification.[5]

On appeal, counsel states that "the meeting minutes from the AILA Liaison Committee Meeting at NSC April 12, 2007 confirmed that in EB2 cases involving beneficiaries with an Indian 3 year Bachelor's degree followed by a 2 year Master's degree, I-140 cases are approvable where the petitioner has either submitted (1) examples of comparable U.S. Master's programs requiring only one year to complete or (2) a credential evaluation that provides a detailed comparison of course credits." The Nebraska Service Center responses state that "each petition filed must contain sufficient documentary evidence to establish that the beneficiary meets the qualifications set forth in the labor certification." Again, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d at 75 (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d at 1022 (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private

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[4] Line 14 additionally states that any suitable combination of education, training, and experience is acceptable. However, as set forth above, the advanced degree category requires that the petitioner submit one degree determined to meet the requirements of the labor certification. This language does not alter the statutory advanced degree requirement. A petitioner cannot rely on a combination of education and experience to meet an advanced degree requirement.

[5] As noted by the director, the labor certification only allowed the individual to qualify based on a Master's degree. Even if her credentials were combined and considered as equivalent to a U.S. Bachelor's degree, which is not stated on the labor certification, as her coursework was completed in May 2003, she would be unable to show that she had five years of post-baccalaureate progressive experience by the October 26, 2007 priority date to show that she would meet any alternate qualifications had the petitioner stated those on the labor certification. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. We note that the petitioner filed a subsequent, separate ETA Form 9089 on the beneficiary's behalf, and subsequent, separate Form I-140, which stated the position's requirements as a bachelor's degree and five years of experience. The labor certification before us, however, does not state or allow for any alternate combination of education and experience.

publications or widely circulated). The AAO must consider the labor certification requirements as stated in this individual petition against the beneficiary's qualifications.

Counsel submits information about several U.S. institutions of higher education that offer MBA programs of a duration less than six years of total undergraduate and graduate study combined including five-year combined bachelor's and master's programs at Pepperdine University,[6] Philadelphia University, Cornell University,[7] and the University of Maine[8] and one-year MBA programs offered by the University of Florida[9] and Emory University.[10] The AAO acknowledges that degree programs shorter than the normal four years of Bachelor's study and two years of Master's study are available in the U.S. However, those U.S. programs are condensed programs with annual requirements in excess of the traditional degree programs in order to shorten the overall time of study.[11] For example, for the University of Maine program to receive a Master's degree in

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[6] The Pepperdine University website proscribes certain classes that must be taken by its 5 year degree students both as undergraduates and graduate students and requires two non-credit internships. *See* http://bschool.pepperdine.edu/programs/5year/curriculum/ (accessed November 3, 2011).

[7] The Cornell University website states that admission to its five year program is predicated upon the student finishing the four-year undergraduate program in three years. The student then takes the first year of graduate studies during the fourth year of school. In essence, the student may have to take a heavier course load than the usual number of credit hours per semester or study during the summer(s) in order to finish the four-year undergraduate degree in three years; the credit or hour requirement is not reduced even though the number of years in duration is less than traditional programs. *See* http://www.johnson.cornell.edu/Academic-Programs/Full-Time-MBA/Dual-Degree-Programs/5-Year-Bachelors-MBA.aspx (accessed November 3, 2011).

[8] The University of Maine website states that two summer sessions are required of its 5-year MBA students. *See* http://umaine.edu/business/mba/graduate-programs/5-year-mba/ (accessed November 3, 2011). That extra time adds two additional semesters, or one year, of study to a traditional five years of study so that the 5 year MBA actually takes six academic years to complete.

[9] The University of Florida website states that its MBA program requires the completion of either 32 or 48 credits over a period of 10 or 12 months (the shorter program and lesser credits are only available for individuals with an undergraduate business degree earned in the previous seven years). *See* http://www.floridamba.ufl.edu/traditional/overview.asp (accessed February 10, 2011).

[10] The Emory website stresses that its one-year MBA program involves an intensified third semester to prepare for the specialized classes available to second year MBA students (after completing a four-year bachelor's degree, the one-year MBA students have a summer session to complete the required basic business classes, then take classes like a second-year MBA student), which effectively lengthens the program to five and one-half years. *See* http://www.goizueta.emory.edu/degree/fulltimemba/one-year_program.html (accessed February 10, 2011).

[11] Counsel claims in response to the AAO's Notice of Intent to Deny (NOID) that the logic used by the director in denying the petition is flawed in that a five-year degree from Pepperdine would be considered a U.S. master's degree but a foreign degree of the same duration would be rejected. Counsel's interpretation is incorrect. Instead, a showing must be made by the petitioner that the

less than two years requires "one academic year, two summer terms, and the incorporation of required undergraduate prerequisites during the students [sic] undergraduate program of study." Most of the websites specifically reference that students must plan in advance of Master's admission and bachelor completion to undertake the dual program. Certain coursework and extra sessions, depending on the program, must be completed to qualify. Nothing shows that the beneficiary's program of study was jointly undertaken between the two schools to result in a compressed program to meet the foreign equivalent of a U.S. Master's degree.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).[12] According to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.aacrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials." Authors for EDGE work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at *www. Aacrao.org/publications/guide to creating international publications.pdf.* If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.[13]

EDGE's credential advice provides that a two-year Indian Master's of Commerce degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." EDGE's credential advice provides that an Indian Bachelor's of Commerce degree "represents attainment of a

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number of years of study and the degree(s) obtained are the foreign equivalent to the required degree.

[12] In *Confluence Intern., Inc. v. Holder,* 2009 [redacted] the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision. [redacted], a federal district court upheld a USCIS conclusion that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

[13] In response to the AAO's NOID, counsel stated that reliance on EDGE "is not well placed" because it does not specifically consider five year degrees awarded by U.S. institutions. EDGE assesses the equivalency of foreign education. As noted above, many of the five-year programs cited by the petitioner are compressed programs.

level of education comparable to two to three years of university study in the United States." Here, the beneficiary's transcripts confirm that the beneficiary's bachelor program of study was three years.

The beneficiary's Master of Commerce following a three-year Bachelor of Commerce degree is not the foreign equivalent to a U.S. Master's degree. *See Tisco Group v. Napolitano*, 2010 [redacted], [redacted] (E.D. Mich. Aug. 30, 2010) (holding that the petitioner had not explained how five years of study in India was the equivalent to the six years of study typically required for a U.S. Master's degree and that the AAO's reliance upon EDGE was appropriate).[14]

The petitioner submitted two credential evaluations from [redacted] and [redacted] of the Trustforte Corporation. Both evaluations conclude that the beneficiary has the equivalent of a U.S. Master of Business Administration degree. [redacted] reaches his conclusion after examining the beneficiary's course of study at the University of Delhi and Annamalai University and reaching the conclusion that the beneficiary completed "a total of five years of academics." The evaluation states that the beneficiary's underlying three-year degree from the University of Delhi would be equivalent to "the completion of three years of academic studies leading to a university degree from an accredited institution of higher education in the United States" but does not conclude that it would be equivalent to a four-year U.S. bachelor's degree. [redacted] lists the classes taken by the beneficiary in business from both Universities and assigns U.S. credit per class (5 hours for the classes taken at University of Delhi and 6.75 credits for the classes at Annamalai University). [redacted] accepts the provisional certificate in the record as evidence that the beneficiary earned a Master's of Commerce degree, cites to combined five year bachelor and master's programs that exist in the U.S.,[15] and concludes that the beneficiary thus holds an MBA similar to the five year programs noted above. In reaching his conclusion, [redacted] states that the coursework taken by the beneficiary at Annamalai University "mirrors coursework taken in any one year Master of Business Administration program in the United States." U.S. graduates would enter the Master's programs based on the predicate of a completed Bachelor's

[14] In response to the AAO's NOID, the petitioner stated that *Tisco* did not address the issue that some accredited U.S. institutions may award Master's degree after five years of study. Although the *Tisco* court may not have addressed this exact point, the reasoning that five years of study may not equate to a program of six years of study remains true. As discussed above, the U.S. institutions that award Master's degrees after five years of undergraduate/graduate study generally require a more intensive condensed study period. The programs can therefore be distinguished from non-U.S. degrees that do not require a more intensive curriculum but that allow students to complete undergraduate/graduate programs in five years as a matter of practice.

[15] [redacted] cites the program at Carnegie Mellon University as an example of a five-year program, however, that program is restricted to certain majors and requires the five-year students to take much heavier course loads than the traditional track (four plus two year) students and requires internships during the summers. *See* http://tepper.cmu.edu/mba/mba-programs-coursework/dual-joint-degrees/32-programs/index.aspx (accessed November 3, 2011).

degree. Here, the beneficiary's bachelor's degree has not been assessed as the equivalent of a four-year bachelor's degree.

The second evaluation from [redacted] concludes that the beneficiary's Bachelor of Commerce degree is "the equivalent of three years of academic studies toward a Bachelor of Business Administration Degree." [redacted] then concludes that the beneficiary's completion of the Indian Master's of Commerce program resulted in "the [U.S.] equivalent of a Master of Business Administration Degree" with a concentration in Accounting without directly explaining how the overall result of five years of study would be comparable with one less year of education than that required by U.S. institutions.

Both evaluations conflict with EDGE. The director noted in his decision that a three-year Bachelor of Science [Commerce] degree is not the foreign equivalent to a four-year U.S. bachelor's degree and that a Master's degree following a three-year foreign bachelor's degree would not equate to a U.S. Master's degree. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The beneficiary does not have an advanced degree assessed to be the foreign equivalent of the required Master's degree and thus does not qualify for preference visa classification under section 203(b)(2) of the Act. Accordingly, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

In addition to the failure to demonstrate that the beneficiary qualified for the position, the petitioner failed to submit adequate evidence of its ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains

lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on October 26, 2007. The proffered wage as stated on the ETA Form 9089 is $37,107.20 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of more than $17 million, and to currently employ 200 workers. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the following Forms W-2:

- The 2007 Form W-2 stated that the petitioner paid the beneficiary $28,223.00.
- The 2008 Form W-2 stated that the petitioner paid the beneficiary $30,992.24.
- The 2009 Form W-2 stated that the petitioner paid the beneficiary $32,782.04.
- The 2010 Form W-2 stated that the petitioner paid the beneficiary $41,405.20.

As the amounts in 2007, 2008, and 2009 were less than the proffered wage, the petitioner must submit evidence that it has the ability to pay the difference between the actual wage paid and the proffered wage, which in 2007 was $8,884.80; in 2008 was $6,115.56; and in 2009 was $4,325.76. The amount paid to the beneficiary in 2010 exceeded the proffered wage in that year, so the petitioner demonstrated its ability to pay the proffered wage in 2010 alone.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F.Supp. at 537 (emphasis added).[16]

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on September 11, 2008 with the receipt by the director of the petitioner's original submissions. As of that date, the petitioner's 2007 federal income tax return was the most recent return available.

- The 2007 Form 1120 reflected net income of $288,855.
- The 2008 Form 1120 reflected net income of $32,202.
- The 2009 Form 1120 reflected net income of $67,791.
- The 2010 Form 1120 reflected net income of $188,351.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[17] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The 2008 through 2010 Forms 1120 reflect the following net current assets:

- The submitted 2007 Form 1120 does not include a Schedule L.[18]

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[16] On appeal, counsel argues that "depreciation should be added to net [in]to [the] net income, wages paid to the beneficiary, and the ratio analysis . . . [because] depreciation by definition is not considered a loss." As stated by the court in *River Street Donuts,* "depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, . . . even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages." *River Street Donuts,* 558 F.3d at 118.

[17] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[18] The petitioner's did not submit a full and complete copy of its 2007 Form 1120 including Schedule L, despite the AAO's RFE request for a full tax return. As a result, the net current assets cannot be determined in that year. In response to the AAO's RFE, counsel stated that the petitioner

- The 2008 Form 1120 reflects net current assets of $600,449.
- The 2009 Form 1120 reflects net current assets of $646,971.
- The 2010 Form 1120 reflects net current assets of $939,025.

If the instant beneficiary were the only sponsored worker, the petitioner's net income would be sufficient to establish its ability to pay the difference between the actual wage paid and the proffered wage. However, the petitioner has filed other Immigrant Petitions for Alien Workers (Form I-140) for multiple other workers. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In response to the AAO's Request for Evidence, dated April 13, 2011, which specifically requested that the petitioner provide evidence that it had the ability to pay the proffered wage to each sponsored worker, the petitioner listed three sponsored workers along with their priority dates and proffered wages. USCIS records, however, indicate that the petitioner has filed at least 68 Form I-140 petitions from 1999 onward, including many overlapping the pending of the instant petition, as well as hundreds of Form I-129 petitions filed during that same time.[19] The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Based on the number of filings indicated compared to USCIS records, the petitioner's response to the AAO's RFE that it only sponsored three workers appears to be substantially lacking. Therefore, despite the petitioner's net income and net current assets, we cannot conclude that the evidence demonstrates the petitioner's ability to pay the proffered wage to each sponsored worker. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and

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had net current assets in excess of $500,000, however, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

[19] Records reflect that the petitioner has filed over 435 total combined petitions from 1998 thereafter.

new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

While the petitioner's tax returns reflect relatively high gross receipts, net income, and net current assets, based on the inadequate evidence in response to the AAO's RFE, we cannot conclude that the petitioner demonstrated its ability to pay its multiple sponsored workers their respective proffered wages. The petitioner similarly submitted no evidence regarding its reputation to liken its situation to the one presented in *Sonegawa*. Thus, assessing the totality of the circumstances in this individual case without the additional requested evidence regarding the multiple sponsored beneficiaries, we are unable to find favorably on the petitioner's behalf based on a totality of the circumstances. It is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.